IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 1436 OF 2004

Bhima Aba Bhosale
(since deceased, through LRs.) ... Appellants

V/s

1. Kamlabai Bapurao Ghodake & ors. ... Respondents

Mrs. Sanjivani V. Jadhav for the appellants.

Mr. I.M. Khairdi for the Respondent No.1.

Mr. Surel S. Shah for the Respondent Nos. 4 & 5.

CORAM: P.V. KAKADE, J.

DATED: 5TH OCT., 2005

P.C.:

1. The appellants have preferred this appeal against the judgment and order passed by the District Judge, Solapur, dismissing the appeal as well as cross-objection and confirming the judgment and order passed by the Civil Judge, S.D., Solapur dated 26.10.1999, whereby the suit against defendant Nos.1A to 1F and defendant No.2 came to be decreed for specific performance of the contract.

2. I have heard the learned counsel for both parties. Perused the record.

3. The plaintiff filed the suit for specific performance of the contract in respect of the suit property and for determination of the price of the electric motor and in the alternative for refund of consideration with interest and other consequential reliefs.

Defendants contested the proceeding on the ground that the transaction was regarding money lending transaction between the parties and the transaction was only for security of the money advanced to the defendants and, as such, it was not an agreement for sale. It was further held that the plaintiff had proved that she had paid Rs.50,000/- to the defendants as part and parcel of the contract and she was ready and willing to perform her part of the agreement and, as such, she was held entitled for specific performance.

4. The appeal was carried to the District Court, Solapur. The learned District Judge, after hearing both sides, dismissed the appeal. It is to be noted that, at

the time of hearing of the appeal, advocate appearing on behalf of the appellants/defendants filed no instruction purshis and none of the appellants were present and, therefore, the learned District Judge proceeded to adjudicate the matter on merits and there was cross-objection filed by the other side. The appeal was dismissed with order to the effect that the appeal was dismissed in default of the appellants and cross-objection also was dismissed. Hence the present appeal.

5. At the outset, it may be noted that there is no substantial question of law involved in this appeal. Strong objection was raised on behalf of the appellants to the effect that there was no instruction purshis filed on behalf of the appellants and when appellants were not present, the matter should not have been disposed of by the order of dismissal for default. However, in fact, it is to be noted that though the term "default" is mentioned while passing the operative order by the District Judge, in fact, the appeal is decided on merits as can be seen from the judgment. Moreover, it appears from the record that the learned District Judge, proceeded to hear the advocate for the respondents as there was cross-objection pending and he was heard on

the points in respect of the cross-objection.

So far as the appellants' presence in the District Court was concerned, the District Judge proceeded with the appeal obviously in view of the fact that, in the course of the Trial, defendant No.2 remained present on the date of the hearing but did not lead any evidence nor cross-examined any party. Further, none of the legal representatives of the defendant No.1 i.e. defendants 1A to 1F i.e. the present appellants and defendants 2, 4 and 7 led any evidence and in fact by Exh.43 consent written statement was filed showing that defendant No.2 who had challenged the suit of the plaintiff has subsequently admitted the claim of the plaintiff by putting his signature on the consent written statement Exh.43. It is also to be noted that, defendant No.2 Bharat had attested thumb impression of the present appellants on Exh.43. In view of this factual matrix, the learned District Judge saw no point in waiting for the appellants and disposed of the appeal. Hence, I do not see any illegality committed by the District Court while disposing of the appeal on merits. Mere use of word "default" would not render the appeal as disposed of in default especially when the reasoning recorded by

the learned District Judge shows that he has taken into account all the relevant aspects while adjudicating the dispute on merits.

6. In the result, I do not see any merits in the appeal and hence the appeal stands dismissed with no order as to costs. Consequently, civil application No. 1896 of 2005 also stands dismissed with no order as to costs.

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